

## **REMARKS**

Claims 1-38 remain pending in the application and stand rejected. Claims 1-11, 13-18, 20-22, 29 and 30 are rejected under 35 U.S.C. § 102(b) as being anticipated by Bouchard US 5,469,079 ("Bouchard"). Claim 12 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Bouchard in view of Moore US 6,370,454 ("Moore"). Claim 19 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Bouchard in view of Burge US Publication 2002/0103622 ("Burge"). Claims 23 and 24 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Bouchard in view of Levine US Publication 2003/0014176 ("Levine"). Claims 25-28 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Bouchard in view of Graf et al. US 5,390,117 ("Graf"). Claims 31-35, 37 and 38 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Bouchard in view of Corrado et al. US 6,272,411 ("Corrado"). Claim 36 is rejected as being unpatentable over Bouchard in view of Corrado and in further view of Graf. Applicants respectfully traverse the rejections and request reconsideration.

### **Rejection based on Bouchard under 102(b)**

The examiner alleges that Bouchard teaches each and every limitation of claims 1-11, 13-18, 20-22, 29 and 30. Because Bouchard at least fails to teach the claimed steps of monitoring operator activity and operator condition, applicants respectfully traverse the rejection.

Bouchard is directed to a system to assess driver performance. However, unlike applicants' invention, Bouchard teaches use of various sensors within the vehicle and a radar or similar system external to the vehicle to determine a current operating condition of the vehicle and a current environment in which the vehicle is operating. From this data, i.e., the vehicle telemetry and environment, Bouchard teaches evaluating a driver's performance

based upon the motion of the vehicle through the environment in comparison to driving standards or past performance. (Col. 5, lines 20-32) This approach does not take into account direct observation and measurement of the driver activity and driver condition. Bouchard does suggest inferring driver drowsiness from reaction time measurements and/or blink rate assessments. (Col. 31, lines 11-23). However, nowhere does Bouchard teach or suggest monitoring of driver activity and condition, such as the presence of passengers and the driver's interactions with such passengers; driver position within the vehicle, e.g., the location of the drivers hands and feet relative to the steering wheel, accelerator, brake and clutch; driver activity in connection with usage of controls or devices in the vehicle such as HVAC controls, infotainment, communication and the like. In short, Bouchard does not teach or suggest obtaining information about what the driver is touching or using in the cockpit of the vehicle to know as much as possible about what the driver is doing at any given moment. (See, specification, page 7, line 11-page 8, line 14). For at least this reason, Bouchard fails to teach or suggest the claimed invention. As such, claims 1 is allowable, and likewise claims 2-11, 13-18, 20-22, 29 and 30, depending there from, are allowable.

**Rejection of Claim 12 based on Bouchard in view of Moore under 103(a)**

Applicants wishes to remind the examiner of the bedrock legal principles for rejecting a claim under 35 U.S.C. § 103. Specifically, in *In re Rouffet*, 47 U.S.P.Q.2d 1453 (Fed. Cir. 1998) the Federal Circuit explained:

To reject claims in an application under section 103, an examiner must show an un rebutted prima facie case of obviousness. In the absence of a proper prima facie case of obviousness, an applicant who complies with the other statutory requirements is entitled to a patent.

*Id.* at 1455 (citations omitted and emphasis added). In the *Rouffet* case, the examiner had rejected the pending claims on a combination of references. The Board sustained the examiner. However, the Federal Circuit reversed the Board's decision and ruled that the examiner's rejections were legally impermissible because they failed to demonstrate a suggestion for combining the references in the manner proposed by the examiner.

As explained by the Federal Circuit:

As this court has stated, “virtually all [inventions] are combinations of old elements.” Therefore, an examiner may often find every element of a claimed invention in the prior art. If identification of each claimed element in the prior art were sufficient to negate patentability, very few patents would ever issue. Furthermore, rejecting patents solely by finding prior art corollaries for the claimed elements would permit an examiner to use the claimed invention itself as a blueprint for piecing together elements in the prior art to defeat the patentability of the claimed invention. Such an approach would be “an illogical and inappropriate process by which to determine patentability.” To prevent the use of hindsight based on the invention to defeat patentability of the invention, this court requires the examiner to show a motivation to combine the references that create the case of obviousness.

*Id.* at 1457 (citations omitted and emphasis added). As will be demonstrated below, these principles have not been followed in rejecting the pending claims. Merely identifying the claimed elements in the prior art, as appears to have been done to reject the pending claims, is not the same as showing a teaching in the art or a motivation to combine or modify the references.

On the contrary, in order to establish a *prima facie* case of obviousness, there must be actual evidence of a suggestion to modify a prior art reference or to combine two prior art references, and the suggestion to combine or modify the prior art must be clear and particular. *In re Dembiczak*, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999). In order to establish a *prima facie* case of unpatentability, particular factual findings demonstrating the suggestion to combine or modify must be made. See, for example, *Ecolchem Inc. v. Southern California Edison*, 56 U.S.P.Q.2d 1065 (Fed. Cir. 2000) and *In re Dembiczak*, 50 U.S.P.Q.2d 1614, 1617-1618 (Fed. Cir. 1999), where the Court of Appeals for the Federal Circuit stated:

In addition to demonstrating the propriety of an obviousness analysis, particular factual findings regarding the suggestion, teaching, or motivation to combine or modify serve a number of important purposes, including: (1) clear explication of the position adopted by the Examiner and the Board; (2) identification of the factual disputes, if any, between the applicant and the Board; and (3) facilitation of review on appeal.

Indeed, the law is quite clear that an obviousness rejection must be based on facts, not conjecture. Thus, applicants assert the examiner has not carried the required burden to establish a *prima facie* case of obviousness because there is no teaching or suggestion in the

cited references to modify or to combine them to achieve the invention claimed.

Applicants first assert that Moore does not qualify as prior art under any of 35 U.S.C. §§ 102(a), 102(b) or 102(e), and as such may not be combined with Bouchard to form a 103(a) rejection. While for the reasons set forth below, applicants believe the claims are allowable over these references and applicants traverse the rejection. If such becomes necessary; however, applicants will provide a declaration establishing conception of the claimed invention at least as early as the February 25, 2000 priority date of the Moore reference.

The examiner alleges that while Bouchard fails to teach or suggest infotainment controls, Moore teaches such controls. Applicants submit as an initial matter that Bouchard fails to teach all of the remaining limitations of the claim, and namely, the claimed steps of monitoring vehicle operator condition and activity. Thus, claim 12 is allowable over the cited combination.

One of skill in the art would not be motivated to combine the teaching of Bouchard and Moore. Bouchard teaches a system that evaluation of driver performance from operation of the vehicle within a particular environment. It is the operating states of the vehicle that provide input to Bouchard's calculus. Status of infotainment systems are not relevant to the current operating parameters of the vehicle, i.e., speed, gear selection, throttle position, steering position, road shape and condition, etc. in the Bouchard system. Simply put, there is no teaching or suggestion in either Bouchard or Moore to incorporate the status of infotainment controls into a determination of driver performance. As stated by the examiner it is obvious to incorporate these data to facilitate servicing and maintaining the vehicle; however, servicing and maintaining the vehicle are not what either Bouchard or the claimed invention are about. Therefore, claim 12 is allowable.

### **Rejection of Claim 19 based on Bouchard in view of Burge under 103(a)**

Applicants first assert that Burge does not qualify as prior art under any of 35 U.S.C. §§ 102(a), 102(b) or 102(e), and as such may not be combined with Bouchard to form a 103(a) rejection. While for the reasons set forth below, applicants believe the claims are allowable over these references and applicants traverse the rejection. If such becomes necessary; however, applicants will provide a declaration establishing conception of the claimed invention at least as early as the July 17, 2000 earliest priority date of the Burge reference.

The examiner alleges that while Bouchard fails to teach or suggest monitoring vehicle passengers, Burge teaches such monitoring. Applicants submit as an initial matter that Bouchard fails to teach all of the remaining limitations of the claim, and namely, the claimed steps of monitoring vehicle operator condition and activity. Thus, claim 19 is allowable over the cited combination.

One of skill in the art would not be motivated to combine the teaching of Bouchard and Burge. Bouchard teaches a system that evaluates driver performance from operation of the vehicle within a particular environment. It is the operating states of the vehicle that provide input to Bouchard's calculus. Status of passengers within the vehicle are not relevant to the current operating parameters of the vehicle, i.e., speed, gear selection, throttle position, steering position, road shape and condition, etc. in the Bouchard system. Simply put, there is no teaching or suggestion in either Bouchard or Moore to incorporate the status of passengers into a determination of driver performance. Moreover, Burge teaches monitoring passengers for the purpose of reporting passenger status to a trauma center, not to any vehicle system. Any analysis of the passenger information is therefore sent remote of the vehicle, and not incorporated into a determination of driver performance.

**Rejection of Claim 23 and 24 based on Bouchard in view of Levine under 103(a)**

Applicants first assert that Levine does not qualify as prior art under any of 35 U.S.C. §§ 102(a), 102(b) or 102(e), and as such may not be combined with Bouchard to form a 103(a) rejection. While for the reasons set forth below, applicants believe the claims are allowable over these references and traverse the rejection. If such becomes necessary; however, applicants will provide a declaration establishing conception of the claimed invention at least as early as the August 2, 2000 earliest priority date of the Levine reference.

The examiner alleges that while Bouchard fails to teach or suggest receiving traffic control data, Levine teaches this step. Applicants submit that Bouchard fails to teach all of the remaining limitations of the claim, and namely, the claimed steps of monitoring vehicle operator condition and activity. Levine adds nothing to the teaching of Bouchard. In fact, Levine is very similar to Bouchard in the types of data considered in making a determination to enter an automatic control mode. However, nowhere in Levine is it taught or suggested to also use operator condition and activity data. Thus, even if Bouchard and Levine are combined as suggested by the examiner, all of the limitations of the claims are not met. Thus, claims 23 and 24 are allowable over the cited combination.

**Rejection of Claims 25-28 based on Bouchard in view of Graf under 103(a)**

The examiner alleges that while Bouchard fails to teach or suggest inferring performance of the operator from the vehicle operating data, the operator activity data, the environment data and the operation condition data, Graf teaches this step. Applicants submit as an initial matter that Bouchard fails to teach all of the remaining limitations of the claim, and namely, the claimed steps of monitoring vehicle operator condition and activity. Therefore, the operator activity and condition data are not available in any situation to conduct the claimed inferring step. Thus, claim 25-28 is allowable over the cited

combination.

One of skill in the art would not be motivated to combine the teaching of Bouchard and Graf. Bouchard teaches a system that evaluates driver performance from operation of the vehicle within a particular environment. It is the operating states of the vehicle that provide input to Bouchard's calculus. Graf teaches controlling an automatic transmission in a system including a fuzzy inference system to generate control systems for the transmission. There is no suggestion in Graf or Bouchard to use the Graf inference system to evaluate driver performance.

The examiner states that one of ordinary skill in the art would modify Bouchard in view of Graf "in order to evaluate various signals characterizing driving states of the motor vehicle." Driving states of the motor vehicle are only an input to the Bouchard system. Thus Graf may be useful in establishing the inputs to the Bouchard calculation, but the combination of Bouchard and Graf does not result in the claimed invention.

**Rejection of Claims 31-35, 37 and 38 based on Bouchard in view of Corrado under 103(a)**

The examiner alleges that while Bouchard fails to teach or suggest a sensor fusion module operable to provide a master condition list, Corrado teaches this structure. Applicants submit, as discussed above in connection with the method claims 1-30 that Bouchard fails to teach all of the remaining limitations of the claim, and namely, the structure for monitoring vehicle operator condition and activity. Thus, even if Bouchard and Corrado are combined as suggested by the examiner, all of the limitations of the claims are not met. Thus, claims 31-35, 37 and 38 are allowable over the cited combination.

The examiner alleges that Corrado teaches use of a sensor fusion module to provide a master condition list and to determine a current operating condition based upon the master condition list to assess an operator action in order to provide an operator performance

assessment value citing col. 7, line 7 - col. 8, line 52 of the Corrado patent. Applicant disagrees that this passage, or any passage of Corrado, teaches providing a master condition list or providing an operator performance assessment of any kind.

Corrado teaches an occupancy sensor system to reliably detect the presence or absence of a passenger in a passenger seat and the presence or absence of a rear-facing child seat in the passenger seat and to provide an occupancy state signal to an air bag controller. Col. 3, lines 51-56. Thus, the fusion matrix cited by the examiner at col. 7, line 7 - col. 8, line 52 relates only to determining whether the passenger seat of the vehicle is occupied. There is no teaching or suggestion whatsoever of use of any of the information provide by the fusion matrix for determining an operator assessment. Moreover, Bouchard makes no teaching or suggestion of passenger presence as an input to making an operator performance assessment. The only way the examiner can arrive at this conclusion is through hindsight in view of applicants own disclosure. As noted above, the examiner must do more than simply find the elements in the prior art. The prior art itself, not applicants' disclosure, must provide the suggestion or motivation to combine the references.

Thus, applicants submit claim 31 is allowable. Likewise, applicants submit claims 32-35, 37 and 38 are allowable.

**Rejection of Claim 36 based on Bouchard in view of Corrado under 103(a) and in further view of Graf**

For at least the reasons set forth above for the allowance of claims 31-35, 37 and 38, and for the reasons set for above for the allowance of claims 25-28, applicants submit claim 36 is allowable.

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to pass this application to issue.



The commissioner is authorized to charge any deficiency in the amount enclosed or any additional fees which may be required to Deposit Account No. 13-2855.

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Respectfully submitted,

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